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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 624

MATLAW CORPORATION, PETITIONER

v.

WAR DAMAGE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Southern District of Indiana (R. 21–26) is reported at 7 F. R. D. 349. The opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 77–82) is reported at 164 F. 2d 281.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 29, 1947 (R. 83), and a petition for rehearing was denied on December 9, 1947 (R. 121). The petition for a writ of cer-

tiorari was filed on February 25, 1948. The jurisdiction of this Court is apparently invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (cf. Pet. 4).

QUESTION PRESENTED

Whether the courts below erred in holding that petitioner was not a claimant in a true class suit and accordingly could not aggregate the claims of those similarly situated in order to satisfy the $3,000 jurisdictional requirement of Section 24 (1) of the Judicial Code.

STATUTES INVOLVED

The pertinent portions of the statutes involved are set forth in the Appendix, *infra,* pp. 14–16.

STATEMENT

The respondent, War Damage Corporation, was created on December 13, 1941, by the Federal Loan Administrator, with the approval of the President, pursuant to Section 5d of the Reconstruction Finance Corporation Act (Act of January 22, 1932, c. 8, 47 Stat. 5, as amended (15 U. S. C. 606b)); its powers were defined subsequently by Section 5g of the Act of March 27, 1942, 56 Stat. 175 (15 U. S. C., Supp. V, 606b–2) (Appendix, *infra,* pp. 14–16), further amending the Reconstruction Finance Corporation Act (R. 21–22, 77). Respondent's charter purpose was to provide insurance coverage for damage to prop-

erty by enemy attack (R. 7, 22, 77).[1] Its authorized capital stock was $100,000,000, all of which was subscribed for by the Reconstruction Finance Corporation and was non-transferable (R. 22, 78). Prior to July 1, 1942, respondent provided war damage insurance without cost (R. 22, 77). Thereafter, in accordance with Section 5g of the Act (Appendix, *infra*, pp. 14–16), this insurance was made available to all property owners who desired it upon the payment of annual premiums (R. 22, 78). On November 30, 1942, respondent issued a policy to petitioner for which the latter paid a premium of $104 and a second premium of $104 on November 30, 1943 (R. 3–4, 22–23, 78).[2]

Respondent began dissolution proceedings shortly after the termination of hostilities (R. 22). Because covered losses were relatively few, it ceased operations with a sum of money in excess of $225,000,000, of which only a small percentage was required for the payment of current expenses and outstanding claims (R. 3, 22). On August 30, 1946, petitioner instituted this suit as a class action under Rule 23, F. R. Civ. P. (R. 1). The complaint alleged that jurisdiction was

[1] Article 3 of the charter (Pet. 85) provided in part: "The objects, purposes and powers of the corporation shall be: To provide, through insurance, reinsurance or otherwise, reasonable protection against loss of or damage to property, real and personal, which may result from enemy attack. * * *"

[2] Insurance was issued through fiduciary agents which included any insurance carrier specifically appointed by respondent (R. 3, 22, 78).

based on the fact that the matter in controversy exceeded $3,000 and arose under the Constitution and laws of the United States (R. 1–2); that respondent held as "net premiums" a sum exceeding $225,000,000 (R. 3);[3] and that petitioner had paid respondent annual premiums in the sum of $208 (R. 3–4). It prayed, *inter alia*, that the court require respondent to distribute its profits among former policy holders, in proportion to the premiums paid by them, on the ground that these profits were held by respondent "as trustee for the common pro rata benefit of all said policy holders" (R. 4).[4] Respondent filed a motion to dismiss the complaint, asserting that the court was without jurisdiction in that this was not a true class suit and that therefore the jurisdictional amount was not present since petitioner's individual interest totaled at the most only $208 (R. 15, 23).[5]

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[3] Respondent showed a net profit in excess of $209,827,810.45 on its operations to July 30, 1947 (R. 50).

[4] Petitioner's second claim requested the court to require respondent to return to policy holders the second annual premium which it alleged had "needlessly increased [the] fund by more than $100,000,000" (R. 5). Its third claim requested the court to require respondent to distribute their share of profits to those policy holders who were required to purchase insurance by the R. F. C. and other government instrumentalities under the terms of mortgages, loans, contracts, and other arrangements (R. 6).

[5] The Government also urged (R. 79) that petitioner has failed to state a cause of action because: (1) in defining the functions of the War Damage Corporation in Section 5g of the Reconstruction Finance Corporation Act, it was clearly

The district court dismissed the complaint for want of jurisdiction on the ground that since petitioner was asserting merely an individual right this was not a true class action, and, accordingly, petitioner could not aggregate the claims of other policy holders in order to achieve the $3,000 minimum required by Section 24 (1) of the Judicial Code (R. 23–26). Petitioner thereupon appealed (R. 27). Pending this appeal, and on July 30, 1947, the Government Corporations Appropriation Act, 1948 was enacted (Pub. Law 268, c. 358, 80th Cong., 1st sess., Appendix, *infra*, p. 16). By this statute, respondent was directed to pay immediately into the Treasury of the United States the surplus funds which had accrued, to be applied to the reduction of the national debt. On August 29, 1947, respondent transferred the sum of $209,827,810.45 to the Treasury of the United States (R. 50).[6] On

the intention of Congress that the surplus funds should not be distributed to the policyholders, but should be retained by the United States, and (2) the War Damage Corporation was, at least, a stock insurance corporation and its surplus belongs to the stockholders—the United States. Cf. *Cherry Cotton Mills* v. *United States*, 327 U. S. 536.

[6] Petitioner's motion for a temporary restraining order and preliminary injunction restraining the transfer (R. 40–44) was denied by the court below on September 4, 1947 (R. 65). Petitioner's motion to make the Treasurer of the United States and the Commissioner of Accounts ancillary parties-appellee and to restrain them from cashing the check and applying the amount to the national debt (R. 68–70) was denied by the court below on September 18, 1947 (R. 75).

appeal, the court below affirmed the judgment of the district court (R. 83).

ARGUMENT

The single issue posed in the instant case is whether the sum in controversy satisfies the $3,000 minimum prescribed by Section 24 (1) of the Judicial Code. Both courts below, correctly we submit, held that it did not and that the complaint should be dismissed for lack of jurisdiction. See *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 588–589; *Andrews* v. *Equitable Life Assurance Society*, 124 F. 2d 788, 790–791 (C. C. A. 7), certiorari denied, 316 U. S. 682; *Sturgeon* v. *Great Lakes Steel Corp.*, 143 F. 2d 819, 821 (C. C. A. 6), certiorari denied, 323 U. S. 779. Petitioner also urges a number of constitutional and statutory questions which this case does not reach (Pet. 5–14, 15–32, 33–83). But, even assuming *arguendo* that the jurisdictional amount be present, it is clear that there were no constitutional barriers to the creation of the War Damage Corporation, and that Congress specifically intended that any profits which might accrue from its operation would inure to the benefit of the Government.

1. Original federal jurisdiction, except under special acts, none of which is here involved, exists "* * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000 and (a) arises under the Constitution or laws of the United States * * *."

Judicial Code § 24 (1), as amended (28 U. S. C. 41 (1)). Petitioner attempts to ground the jurisdiction of this Court on that statute (Pet. 16–18, 33–48). Although its own claim is something less than $208, petitioner asserts that the jurisdictional minimum is achieved by aggregating the claims of those alleged to be "class members" (R. 4). But petitioner's claim is an individual one based on its contract of insurance, and an individual claim, based on contract, may not be transmuted to a class claim. See *Pinel* v. *Pinel,* 240 U. S. 594, 596; *Lion Bonding Co.* v. *Karatz,* 262 U. S. 77, 86; *Clark* v. *Paul Gray, Inc.,* 306 U. S. 583, 588; *Woods* v. *Thompson,* 14 F. 2d 951, 952 (C. C. A. 7); *Illinois Bankers' Life Association* v. *Farris,* 21 F. 2d 1014 (C. C. A. 7), certiorari denied, 276 U. S. 621; *Andrews* v. *Equitable Life Assurance Soc.,* 124 F. 2d 788, 790–791 (C. C. A. 7), certiorari denied, 316 U. S. 682; *Sturgeon* v. *Great Lakes Steel Corp.,* 143 F. 2d 819, 821 (C. C. A. 6), certiorari denied, 323 U. S. 779; *Knowles* v. *War Damage Corporation,* Civ. No. 37624 (D. D. C.); 2 Moore, *Federal Practice,* 2235–2245. Cf. *Equitable Life Assurance Soc.* v. *Brown,* 213 U. S. 25, 46–47; *Gibbs* v. *Buck,* 307 U. S. 66, 72–75; *Grand Rapids Furniture Co.* v. *Grand Rapids F. Co.,* 127 F. 2d 245, 250–251 (C. C. A. 7); *Pentland* v. *Dravo Corporation,* 152 F. 2d 851, 852–853 (C. C. A. 3). The decision below is, we submit, clearly correct.

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Petitioner relies heavily upon and asserts a conflict with *Thompson* v. *Deal*, 92 F. 2d 478 (App. D. C.) in urging that the courts below erred in holding that the present action is not a true class suit (Pet. 35–36, 41, 70). That case arose after the repeal of the Bankhead Cotton Control Act and was to recover monies paid by certain cotton producers to government agents pursuant to the repealed Act. This money, however, was a private fund and the government agents were mere custodians. It is clear, however, that the *Thompson* case is not in point. In the first place, the claimant's individual interest in the fund was in excess of the jurisdictional amount required by Section 24 (1) of the Judicial Code (92 F. 2d at 481). Moreover, that suit, instituted as a class action, partook somewhat of the nature of an action by a stockholder to protect a corporate right. It was directed against a private fund in which the United States had no pecuniary interest, and which allegedly had been deposited under duress pursuant to an agreement whereby the government agents were designated trustees. In the instant case the jurisdictional amount is not present, no trust exists, and petitioner's rights, such as they may be, are derived from its insurance policy which is a contract. We submit accordingly that no conflict exists.

2. The court below, disposing of the case on the jurisdictional issue, did not reach the merits. The petition for certiorari nevertheless seeks review

of both the jurisdictional and substantive questions involved in the suit. While we doubt whether the latter questions may appropriately be reviewed by this Court at this stage of the litigation, we submit that they do not present any grounds for certiorari. Petitioner's chief complaint on the merits appears to be that, since the anticipated enemy attacks did not materialize and the actual losses did not approach anticipated losses, it somehow has an equitable interest in the net profits which respondent earned. It seeks to support its position by reliance upon the legislative history of Section 5g of the Reconstruction Finance Corporation Act (Appendix, *infra*, pp. 14–16) which, it asserts, demonstrates that Congress never intended that any profits which might accrue from respondent's operations would revert to the United States (Pet. 48–72). We submit that such an argument is wholly without substance. Neither Section 5g nor the regulations promulgated by respondent governing the issuance of war damage insurance policies [7] contains any provision from which it might be inferred that the policyholders would have any claim to respondent's profits. Moreover, the legislative history of Section 5g clearly demonstrates a congressional intent that any surplus which might accrue be paid to the United States

[7] Regulations, July 1, 1942, and amendments (11 Fed. Reg. 177A–459 at 476; R. 7–13).

Treasury.[8] Any doubt entertained concerning the legislative intent is dispelled by the Government Corporations Appropriation Act, 1948 (Pub. Law 268, 80th Cong., (Appendix, *infra*, p. 16) which specifically commanded respondent to turn its profits over immediately to the Treasury of the United States in order to reduce the national debt. It is a familiar rule of statutory construction that subsequent legislation relating to the same subject matter may be considered by the Court in determining legislative intent. See *Great Northern Ry. Co.* v. *United States,* 315 U. S. 262, 277; *Weedin* v. *Chin Bow,* 274 U. S. 657, 667; *Bowling* v. *United States,* 233 U. S. 528, 535–536.

3. Petitioner's argument appears to proceed on

[8] Respondent was created in order to allay the widespread fears of enemy bombing, and because of the fact that private insurance companies could not carry this type of risk. Senate Report No. 1012, 77th Cong., 2d Sess., pp. 2–3. The debates which preceded the enactment of Section 5g of the Reconstruction Finance Corporation Act (Appendix, *infra*, pp. 14–16) clearly indicate a Congressional intent that the Corporation be run in a business-like manner, issuing insurance policies for reasonable premiums at rates approved by Congress, and that any profit the Corporation might make would accrue to the United States, just as any loss would be borne by the United States. House Report No. 1907, 77th Cong., 2d Sess., pp. 2, 5; Hearings before the Committee on Banking and Currency, Senate, on S. 2198, 77th Cong., 2d Sess., pp. 91–92; 88 Cong. Rec. 958–959, 1851, 1865, 2653–2654, 2658–2660. Nowhere was it suggested that any profits might be returned to policyholders.

the theory that the United States cannot constitutionally engage in a business venture "to make a profit for the Government * * *" (Pet. 72); that the Congressional mandate to transfer respondent's excess funds to the Treasury deprived petitioner and those similarly situated of their property in contravention of the Fifth Amendment (Pet. 81), and "would make the constitution founders turn over in their graves." (Pet. 82.) The constitutional power to provide for the creation of the War Damage Corporation is clear. See *Hirabayashi* v. *United States,* 320 U. S. 81, 93; *Federal Land Bank* v. *Bismarck Lumber Co.,* 314 U. S. 95, 102; *Pittman* v. *Home Owners' Loan Corp.,* 308 U. S. 21, 32–33. Further, petitioner's contention to the effect that the retention of profits by the Government would be unconstitutional would siphon from the Treasury all surpluses resulting from the various activities of a business and economic nature conducted by the many governmental corporations (See *Keifer & Keifer* v. *R. F. C.,* 306 U. S. 381, 390) and other agencies (See Lilienthal and Marquis, *The Conduct of Business Enterprises by the Federal Government,* 54 Harv. L. Rev. 545 (1941)). No one has yet suggested that, in order to proceed within constitutional bounds, the United States must be run as a gigantic eleemosynary organization.

The short of petitioner's case is that it purchased protection from respondent. Having re-

ceived the protection it paid for, it cannot now ask for the return of the purchase price.[9]

[9] There can be no question that at the very least respondent was created and operated as a corporate entity similar to any private corporation. *U. S. Shipping Board Merchant Fleet Corporation* v. *Harwood*, 281 U. S. 519; *United States ex rel. Skinner & Eddy Corporation* v. *McCarl*, 275 U. S. 1. See *Reconstruction Finance Corporation* v. *Central Republic Trust Co.*, 17 F. Supp. 263 (N. D. Ill.), affirmed *sub. nom. Reconstruction Finance Corporation* v. *McCormick*, 102 F. (2d) 305 (C. C. A. 7), certiorari denied 308 U. S. 558. Under well settled principles of commercial law the profits and surpluses in a stock insurance company belong to the stockholders and the policyholders have no interest therein. *Ohio Farmers Indemnity Co.* v. *Commissioner*, 108 F. (2d) 665, 667 (C. C. A. 6); *Hutchins Mutual Insurance Company of District of Columbia* v. *Hazen*, 105 F. (2d) 53 (App. D. C.). Petitioner attempts to argue, on the authority of *dicta* in *Federal Crop Insurance Corp.* v. *Merrill*, 332 U. S. 380, that these principles are not applicable to a government insurance program (Pet. 37, 73). It is clear, however, that the *Merrill* case is not in point. Moreover, petitioner, having accepted a policy with a stated premium cannot now object that the rate charged was too high. An insurance company can charge any premium it sees fit by express contract or agreement. One accepting the benefits of a policy under a definite contract cannot raise the question as to whether the rates charged were unreasonable or exorbitant. Appleman, *Insurance Law and Practice* (Kansas City, 1944), Vol. 14, Sec. 7843. These principles are merely the application of general contract law to contracts of insurance. See *Mobile Co.* v. *London and Lancashire Insurance Co., Ltd.*, 27 Ala. App. 384, 173 So. 99 (1937), in which the court nonsuited a plaintiff insured seeking to recover allegedly excessive premiums.

CONCLUSION

The decision below is clearly correct, and no conflict exists. The petition for a writ of certiorari should be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
H. G. MORISON,
Assistant Attorney General.
PAUL A. SWEENEY,
EMERY COX, JR.,
Attorneys.

MARCH 1948.

APPENDIX

1. Section 5g of the Reconstruction Finance Corporation Act, Act of March 27, 1942, 56 Stat. 175 (15 U. S. C. 606b–2) provides:

> (a) The Reconstruction Finance Corporation is hereby directed to continue to supply funds to the War Damage Corporation, a corporation created pursuant to section 5d of this Act; and the amount of notes, bonds, debentures, and other such obligations which the Reconstruction Finance Corporation is authorized to issue and to have outstanding at any one time under existing law is hereby increased by an amount sufficient to carry out the provisions of this subsection. Such funds shall be supplied only upon the request of the Secretary of Commerce, with the approval of the President, and the aggregate amount of the funds so supplied shall not exceed $1,000,000,000. The Reconstruction Finance Corporation is authorized to and shall empower the War Damage Corporation to use its funds to provide, through insurance, reinsurance, or otherwise, reasonable protection against loss of or damage to property, real and personal, which may result from enemy attack (including any action taken by the military, naval, or air forces of the United States in resisting enemy attack), with such general exceptions as the War Damage Corporation, with the approval of the Secretary of Commerce, may deem advisable. Such protection shall be made available through the War Dam-

age Corporation on and after a date to be determined and published by the Secretary of Commerce which shall not be later than July 1, 1942, upon the payment of such premium or other charge, and subject to such terms and conditions, as the War Damage Corporation, with the approval of the Secretary of Commerce, may establish, but, in view of the national interest involved, the War Damage Corporation shall from time to time establish uniform rates for each type of property with respect to which such protection is made available, and, in order to establish a basis for such rates, such Corporation shall estimate the average risk of loss on all property of such type in the United States. Such protection shall be applicable only (1) to such property situated in the United States (including the several States and the District of Columbia), the Philippine Islands, the Canal Zone, the Territories and possessions of the United States, and in such other places as may be determined by the President to be under the dominion and control of the United States, (2) to such property in transit between any points located in any of the foregoing, and (3) to all bridges between the United States and Canada and between the United States and Mexico: *Provided,* That such protection shall not be applicable after the date determined by the Secretary of Commerce under this subsection to property in transit upon which the United States Maritime Commission is authorized to provide marine war-risk insurance. The War Damage Corporation, with the approval of the Secretary of Commerce, may suspend, restrict, or otherwise limit such protection in any area to the extent that it may determine to be necessary or

advisable in consideration of the loss of control over such area by the United States making it impossible or impracticable to provide such protection in such area.

(b) Subject to the authorizations and limitations prescribed in subsection (a), any loss or damage to any such property sustained subsequent to December 6, 1941, and prior to the date determined by the Secretary of Commerce under subsection (a), may be compensated by the War Damage Corporation without requiring a contract of insurance or the payment of premium or other charge, and such loss or damage may be adjusted as if a policy covering such property was in fact in force at the time of such loss or damage.

2. The Government Corporations Appropriation Act, 1948 (Pub. Law 268, 80th Cong., 1st sess., c. 358), provides in part:

FEDERAL LOAN AGENCY

War Damage Corporation: The Board of Directors of the Corporation shall pay or cause to be paid to the Treasury of the United States $210,751,618.65 of the amount realized by the Corporation from its operations, such sums to be covered into the Treasury immediately upon the approval of this Act and applied to reduction of the national debt.

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